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No. - .

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1987.

7.92 ACRES OF LAND,
MORE OR LESS, ETC., ET AL.,
GRACE E. BESSAY,
PETITIONERS,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

**Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

BARBARA A. H. SMITH,
DAVIS, ROBINSON & SMITH,
45 Bromfield Street,
Boston, Massachusetts 02108.
(617) 542-8706

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## QUESTION PRESENTED

Whether failure to apply a "manner-of-use-test" in construing the term "dwelling" within the context of the Cape Cod National Seashore Act [16 U.S.C. §459(b)] resulted in an arbitrary and capricious decision by the Department of Interior in refusing to suspend condemnation under the Act, thereby denying petitioner Due Process of Law?

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

7.92 ACRES OF LAND, MORE
OR LESS, ETC., et al.,
GRACE E. BESSAY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.[1]

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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## OPINIONS BELOW

The opinion of the Court of Appeals, United States v. 7.92 Acres of Land, More or Less, Etc., Et Al. (Grace E. Bessay) is not yet reported. (App. A). The opinion of the district court is not

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[1] The caption of the case contains the names of all parties.

yet reported. (App. B). The Final Judgment of Condemnation entered on July 31, 1986 is reprinted in Appendix C.

## JURISDICTION

The decision below entered on August 31, 1987. This petition for a writ of certiorari is filed within ninety (90) days as prescribed by law. 28 U.S.C. §2101(c). The jurisdiction of this court is claimed under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION

### Fifth Amendment

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

Grace E. Bessay petitions for a writ of certiorari to the Court of Appeals for the First Circuit in order that this Court may review the affirmance of a final judgment of condemnation pursuant to 16 U.S.C. §459(b) entered by the District Court for the District of Massachusetts. (App. C).

This case commenced when the United States of America brought a complaint in condemnation against various tracts of land owned by Grace E. Bessay and located within the Cape Cod National Seashore. The only tract at issue in the present proceeding is Tract 11-2241, approximately two acres of land in Truro, Massachusetts. As authority for the taking, the United States claimed the Cape Cod National

Seashore Act, approved August 2, 1961, 75 Stat. 284 (now 16 U.S.C. §§459(b) et seq.).

Miss Bessay answered the complaint alleging inter alia the existence of, "a detached, one-family dwelling, construction of which was begun before September 1, 1959, situated in Tracts 2241 . . . and adjacent land." After a hearing, the District Court allowed the motion of the United States for partial summary judgment (App. B) and subsequently entered a final judgment of condemnation. (App. C). A notice of appeal from that judgment, "insofar as it includes a holding that the tracts in question are not improved property" was filed. The Court of Appeals for the First Circuit affirmed on August 31, 1987.

## STATEMENT OF FACTS

In 1972, petitioner applied for a Certificate of Suspension from Condemnation on the ground that her property was "improved property" for the purposes of the Act, because it contained a dwelling, construction of which was begun before September 1, 1959. Her application was denied, the Superintendent of the Cape Cod National Seashore stating that the application had been reviewed by the Regional Solicitor and, "[b]ased on his review of the matter and our knowledge of the property, it has been concluded it does not qualify for 'improved' property status as described in the Act of August 7, 1961." Condemnation proceedings commenced in 1975. A hearing was held in

the District Court for the District of Massachusetts on November 12, 1981. At that hearing the following facts were elicited:

In 1949, the petitioner moved a three-room structure from another parcel of land to the tract at issue (Tract 2241) where she lived, slept, took meals and entertained guests throughout the summer. The cottage was equipped with beds, a wooden ice box, kerosene and primer stoves, a chemical toilet and chairs, table, sink and a foot stool. Rain water was gathered off the roof and drinking water brought in. Tax bills from the Town of Truro describing the structure as a cottage or dwelling or building for the period of 1954-1980, were introduced.

Miss Bessay further testified that sometime prior to 1959 she dismantled part of the house to conform to the dimensions of Thoreau's cottage and continued to occupy the house as before. The cottage had no foundation, plumbing, electricity nor septic system.

The District Court characterizing the structure in which Miss Bessay dwelled during the summer and autumn months as a "shack"; in non-conformance with local sanitary regulations, ruled that the Department of Interior had acted in accordance with the law when it decided the property in question was not "improved." (App. B). The Court of Appeals affirmed.

## REASONS FOR GRANTING THE WRIT

While this case appears, at first glance, to present only a narrow issue pertaining to a single individual's right to continued enjoyment and security of a seasonal home, it essentially involves any individuals' right to be different, right to be free from undue federal regulation. Not only has the Department of Interior seized the petitioner's property, they have done so in contravention of the purpose and spirit of the very Act which gives them a limited authority to condemn. The Cape Cod National Seashore Act and similar subsequent acts were designed to preserve not only the natural environment of the seashores but the unique way of life of the established inhabitants of the area. The Act was designed to prevent

future commercialization of the area, not to punish those who had for many years enjoyed a simple existence consistent with the natural environment. By refusing to consider the long-established usage of the structure at issue, that it was indeed the owner's seasonal abode, that it provided shelter to friends and guests, that it was equipped with ice box, furniture, sanitary facility, means for cooking, light from kerosene lamps, rainwater collected as our ancestor's did, the government and the courts below have arbitrarily drawn a line between those inhabitants who most seek not to intrude on the natural environment and those who require greater amenities disturbing the natural environment. To give greater protection under the Act to the latter is capricious and illogical.

Therefore, where, as here, a definitional standard has been applied which has direct impact on the interpretation of the several Seashore Recreational Acts, and that standard, as applied, is contrary to the language of the Act itself and its' legislative history and is contrary to the appropriate considerations which have traditionally informed this Court's judgment as to the condemnation of property, it is urged that this petition does present substantial and fundamental questions meriting this Court's consideration. Specifically:

1. The decision below has resolved an important question of federal law, affecting not merely the instant case, but the definitional standard for determining "improved property" in the several acts

concerning the National Seashore Recreational Areas and has adopted a standard in conflict with the intent and purpose of the Cape Cod National Seashore Act.

2. Reliance upon state regulations to define federal statutory terms, rather than the traditional standard of custom and usage conflicts with decisions of this Court in analogous cases involving the definition of the kind of property subject to condemnation.

## ARGUMENT

### I. THE CAPE COD NATIONAL SEASHORE ACT AS WELL AS STANDARD PRINCIPALS OF STATUTORY INTERPRETATION CONTEMPLATE THAT THE TERM "DWELLING" SHALL BE DETERMINED BY REFERENCE TO CUSTOM AND USAGE.

#### A. The Purpose Of The Act.

The Cape Cod National Seashore Act, 16 U.S.C. §459b authorizes the Secretary of Interior to acquire by condemnation, and otherwise, certain lands and waters within the Cape Cod Area of Massachusetts to establish a Cape Cod National Seashore. The conditions under which the power to condemn is to be exercised are restricted. Owners of "improved property" may elect to retain their right of use and occupancy for life or a fixed term of years.[2] The authority of the Secretary of Interior to condemn improved property was suspended for one year during the time in which a valid town zoning bylaw could be enacted and thereafter at all times the zoning bylaw approved by the Secretary of the Interior was in effect.[3] The term

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2 16 U.S.C. 459-3(a).
3 16 U.S.C. 459b-3(b).

"improved property" is defined by the Act as follows:, "a detached, one family dwelling the construction of which was begun before September 1, 1959."[4] The literal language of the statute requires only that the construction of the "dwelling" be begun before September 1, 1959. There is no requirement that construction be completed. There is nothing in the Act, nor in its legislative history which would support construction of the term "dwelling" by other than its literal and ordinary meaning.

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[4] 16 U.S.C. 459b-3(d). The Cape Cod National Seashore Act was the first of a series of conservation bills which allowed owners to retain an interest in "improved property". The Act provided the formula for future "recreation-oriented authorizations." See United States v. 16.92 Acres Of Land, 670 F.2d 1369, 1374 (7th Cir. 1982).

"Dwelling": "the place to live in; residence, abode." The American Heritage Dictionary of the American Language, New College Ed., Houghton-Mifflin Co., 1976 ed., p. 406.

> Dwelling: The house or other structure in which a person or persons live; a residence; abode; habitation; the apartment or building or group of buildings occupied by a family as a place of residence. Structure used as a place of habitation.

Blacks, Law Dictionary, 1979 5th ed.

That the definition of dwelling in the Act was intended to include varied structures consonant with seasonal habitation at the seashore is manifest when one considers the articulated purpose of the Act and the recitation of the types

of dwellings considered. Senate Report No. 428, the Report of the Committee on Interior And Insular Affairs of June 20, 1961, reporting S.857, which was enacted as Public Law 87-126,[5] describes the need for conservation and recognizes that:

> [T]he esthetic, inspirational and scientific values found in the proposed Cape Cod National Seashore are displayed in a diversity of elements stimulating to people in all walks of life.

S. Rep. 2217.

> The bill encourages the Department of the Interior to give the respected and responsible property owners of the lower Cape living within the seashore area and their children the most sympathetic consideration and cooperation, enabling them to hold and administer their property as they have in the

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[5] All references to the Report are paginated to its reprint in 1961 Code Cong. & Adm. News.

> past, subject to the equitable restrictions which the bill provides and which lie within the administrative authority and judgment of the Secretary.

S. Rep. 428, 2221.

In describing existing conditions the Report states:

> Generally, the seashore proposal involves open and forested lands and some portions with scattered homes and cottages. Included are a few isolated groups of cottage rental units of primitive seashore type and several small snack and curio stands. By and large, the homes and cottages are seasonal in use, and, until recent years, widely scattered.
>
> . . . .
>
> Within the Eastham portion of the proposed seashore there were [in 1957] 98 seasonal homes and 60 all-year residences.
>
> In Truro there were 665 seasonal homes and 207 all-year residences, with 185 seasonal and 68 all-year residences within the

> proposed area. There are 5-7 seasonal homes within the proposed area in Orleans, about ten in Provincetown and five to seven in Chatham, ranging in value from $200 to $2,000.

S. Rep. 428, 2218-2219.

It is clear that the Act is intended to preserve the natural ecological balance of portions of the Cape Cod Area, while permitting area residents to continue their unique lifestyle.[6]

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[6] The remarks of the Honorable John F. Kennedy when introducing the bill to the 86th Congress, reflect this theme:

> All of us have had personal associations with the Cape, and all of us have been conscious of the concerns which have been expressed by individual citizens in Cape Cod communities. Each of us has felt that a National Park on Cape Cod was justified only on a strong showing that this was the most effective means of maintaining the historic way of life and scenic integrity of the Cape . . . .
>
> Particulary since there are residents whose roots on the Cape

Moreover, the zoning standards promulgated by the Department of Interior, as required by §459b-4 of the Act, and intended to carry out the purpose and objectives of the Act, specifically direct that zoning bylaws will be designed so that, " . . . the distinctive Cape Cod character of existing residential structures will be maintained." Code of Federal Regulations, 36 CFR Part 27, §27.3(b).

In the context of the Act, then, it is not surprising that Congress intended that seasonal dwellings were to be protected as well as permanent residences or domiciles. Where Congress has intended

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> reach far back into the past, it seems important to adapt a bill in such a way as to meet the legitimate interests and sentiments of existing residents.

Cong. Record, Proceedings & Debates of the 86th Cong., 1st Session.

to define "improved property" in a stricter sense they have done so explicity. See, e.g. Gulf Islands National Seashore Act, 16 U.S.C. 459h-b.

> ("improved residential property": a single family year round dwelling, construction began before January 1, 1967 and which serves as the owner's permanent place of abode at the time of its acquisition by the United States . . .

16 U.S.C. §459h-1(c)).

In contrast, the Cape Cod Act recognizes the seasonal aspects of the cottages that dotted the shoreline. As the First Circuit itself has acknowledged, these structures are, "locally known as shacks, occupied, from time to time by summer residents." United States v. Certain Land located in the County of

Barnstable, 674 F.2d 90, 91 (1st Cir. 1982).[7]

The legislative history of the Act, it is submitted, shows that the narrow construction given by the administrative agency and the courts below is contrary to the will of Congress. Although, it is proper to grant deference to an administrative agency's interpretation of a statute:

> [A reviewing court] must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.

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[7] It is unfortunate that the courts below seized upon this colloquialism and applied the term to the Bessay property in a manner designed to conjure up a picture of a hobo's "shack". See, Memorandum, at 4, App. B.

FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981). Moreover, where the term "dwelling" is left undefined by the statute, this Court has felt compelled to, "'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used' Rusello v. United States, 464 U.S. 16, 21 . . . quoting Richards v. United States, 369 U.S. 1 (1962)"; Securities Ind. Assn. v. Fed. Reserve Bd., 468 U.S. 137, 149 (1984). The ordinary meaning of the term "dwelling", as explicated above, is a structure in which a person lives. It is undisputed that Ms. Bessay occupied her cottage, that it was equipped for sleeping, cooking and entertaining guests and that construction was begun before September 1, 1959. Thus,

we are not asking this Court to review facts but to construe the term "dwelling" within the context of the Act, granting the term its usual meaning.

## II. THE COURTS BELOW ERRED AS A MATTER OF LAW BY REFUSING TO APPLY A MANNER-OF-USE TEST FOR DETERMINING WHETHER A STRUCTURE IS A "DWELLING" WITHIN THE MEANING OF THE ACT.

### A. Traditionally The Manner-Of Use-Test Is Applied In The Context Of Government's Exercise Of Its Power To Take By Eminent Domain.

In essence, by declining to issue a Certificate of Suspension on the basis that the Bessay dwelling is not a dwelling and, therefore, not "improved property," the Department of Interior is condemning and taking the Bessay property. It has long been recognized by this Court that the determination of what compensation is

due or just under the Fifth Amendment is made by consideration of the actual use to which the property has been put. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1983); Morris v. United States, 174 U.S. 196 (1899); United States ex. rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943). Moreover, in certain instances the Court has applied a "use" test in determining if a "taking" requires compensation. See e.g. Mugler v. Kansas, 123 U.S. 623 (1887)("noxious use" test); Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979)(use test defines the nature of a navigational servitude); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)("some remaining use" test). It is submitted

that the refusal of the courts below to apply a manner-of-use test to the instant property is arbitrary and inconsistent with the standards enunciated by this Court in condemnation proceedings in general.

Moreover, it is not consistent with the specific statutory language of the statute which directs the secretary, in making a designation as to the amount of land to be included as "improved property" with a dwelling, to designate:

> that which is reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use . . . in making such a designation the Secretary shall take into account the manner of noncommercial residential use in which the dwelling and land have customarily been enjoyed . . . .

16 U.S.C. §459b-3(d) (emphasis supplied).

## III. THE DEFINITION APPLIED TO THE TERM "DWELLING" IS ARBITRARY AND CAPRICIOUS AND IMPROPERLY RELIES UPON STATE REGULATIONS.

Disdaining the concept that the manner in which the structure was used should play a determinate role in defining a dwelling for the purpose of the Act, the courts below focused exclusively on state sanitary regulations. This approach is contrary to accepted principles applicable to the construction of federal law. Moreover, this manner of definition is simply wrong and backward.

In general, reference to state law in interpretation of federal statute is frowned upon.

> In the absence of a plain indication to the contrary . . . it is to be assumed when

> Congress enacts a statute that it does not intend to make its application dependant on state law.

NLRB v. Natural Gas Utility District, 402 U.S. 600, 603 (1971).

A primary reason for eschewing reliance on state or local regulations to interpret federal statutes is the desire, "for national uniformity unaffected by various state laws, procedures, and definitions . . . . " Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 112-1113 (1983).

The desirabillity of uniform construction is pronounced where, as here, the term is of great significance in application of the several seashore acts modeled upon and which rely upon the legislative history of the Cape Cod Act for their rationale. United States v.

16.92 Acres of Land, supra. at 1374, n.8.

Of particular import in the instant case is the Court's admonition in Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 280 (1980), in construing the Longshoreman's and Harbor Worker's Compensation Act:

> [O]ur task is to ascertain Congressional intent underlying the schedule benefit provisions enacted in 1927, we are not free to incorporate into those provisions subsequent state-law developments that we may consider sound as a matter of policy . . .

Here, the District Court relied, almost exclusively, upon the 1960 State Sanitary Code (Memorandum, App. B) and alleged violations thereof in determining that the structure at issue was not a

dwelling.[8] Thus, the Congress could not have intended to rely on a state sanitary code not yet in effect to give meaning to the term "dwelling".

Moreover, the use of the Sanitary Code as an instrument of definition is illogical and, indeed, constitutes a backward approach. The Code requirements attach only if the structure is, in the first instance, a dwelling, i.e., "any building or shelter used or intended for human habitation or periodic activity."[9] The lack of these amenities, plumbing, electricity, septic system, may, under local law, lead to penalties or to notice

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8 The Sanitary Code, art.1, reg.3 was adopted by the department [of Public Health] on September 13, 1960. Commonwealth v. Hadley, 351 Mass. 439, 440 n.1 (1966).

9 Department of Public Health, The Sanitary Code, Art. XI.

to rectify the conditions or be subject to condemnation, but they may not and do not operate to narrow the ordinary meaning of the term "dwelling" in a federal statute.

It is, therefore, submitted that where the Department of Interior and the lower court, relied solely upon unarticulated "personal knowledge" (Department of the Interior) and reference to local sanitary codes (District Court), without consideration of the custom and usage of the structure in question, their decisions were, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Camp v. Pitts, 411 U.S. 138 (1973)(per curiam).

## CONCLUSION

For the reasons stated above, the petitioner respectfully requests that

certiorari be granted and the case set down for briefing and oral argument; or, in the alternative, that certiorari be summarily granted, the judgment below vacated and the case remanded to the lower court for reconsideration under the "manner-of-use" standard. (Rule 23[1]).

Respectfully submitted,

BARBARA A. H. SMITH
Davis, Robinson & Smith
45 Bromfield Street
Boston, MA 02108
(617) 542-8706

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 86-1825

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

v.

7.92 ACRES OF LAND, MORE OR LESS, ETC.,
ET AL.,
Defendants, Appellees,

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GRACE E. BESSAY,
Defendant, Appellant.

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Before
Campbell, Chief Judge,
Bownes and Torruella, Circuit Judges.

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MEMORANDUM AND ORDER

Entered August 31, 1987

Grace E. Bessay, defendant below, appeals from a decision that her property is not "improved" and so is subject to

condemnation under 16 U.S.C. §459b-3.[1] We affirm.

Bessay makes essentially two arguments on appeal. First, she claims that the district court incorrrectly concluded that her property was not "improved" as defined by 16 U.S.C. §459b-3(d)("[t]he term 'improved property' . . . shall mean a detached, one-family dwelling the construction of which was begun before September 1, 1959 . . . "). Next, she argues that the administrative record which the district court reviewed did not contain sufficient evidence to support the Department of Interior's

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1 The specific order from which Bessay appeals is a final judgment of condemnation. R. Doc. 2C. Her notice of appeal is directed toward that judgment only "insofar as it includes a holding that the tracts in question are not 'improved property.'" R. Doc. 4.

conclusion that the property was not improved.

In 1972, Bessay applied for a Certificate of Suspension from condemnation on grounds that her property was improved because it contained a dwelling. App., Vol. II, pp. 84-86. Her application was denied. Id., p. 87. She indicated in a subsequent letter that she would not permit entry upon her property by any employees of the National Park Service. Id., 133. The government commenced this condemnation action against her in 1975.

The following facts were established at a hearing held in 1981. Bessay had a structure moved onto her property in 1949. In 1959, the relevant date to determine improved property status (see 16 U.S.C.

§459b-3(d)), the structure consisted of a ten by ten foot shack. Id., 142. It contained no plumbing, no electricity, no septic system and no foundation. Id. Bessay testified, however, that as of 1959 the house contained a chemical toilet; a primer stove for cooking; beds for two; chairs; a foot stool; table and sink. Id., 169-70. She used rain water for washing and brought in fresh water for drinking. Id., 172. She entertained guests there. Id., 173.

In United States v. 7.92 Acres of Land, More or Less, 769 F.2d 4 (1st Cir. 1985), we were confronted with the question whether defendant had rebuilding rights after the structure on her land burned down. We looked to whether the structure had been a dwelling so as to

render the land "improved property" under §459b-3(b). We concluded that the land was not improved. We said, in that context:

> The record indicates clearly that the structure, which allegedly existed on [defendant's] land prior to 1959, was never served by utilities, had no waste disposal facilities, and permits for such services or facilities were never obtained or issued. Clearly, the legislative history and the case law interpreting the Act reveal that Congress did not intend to include within the definition of "improved property" the kind of structure which may have existed on [defendant's] land.

Id. at 8.

While we recognize that the issue in 7.92 Acres is not precisely the same as the issue presented here, the discussion of improved property is pertinent. It is not disputed that in 1959 Bessay's

dwelling was not serviced by utilities and that no permits for utility service or waste disposal were obtained. Considering these favors as well as the other characteristics of Bessay's property, we conclude that the district court did not err in determining that Bessay's property was not improved so as to suspend the Secretary's condemnation powers.

We turn next to the argument that the administrative record is too sparse to withstand meaningful judicial review. Bessay raised this argument before the district court. The court noted that although the Department's denial of the application was based in part on "our knowledge of the property," this personal knowledge was not irrelevant and in any event there was enough evidence in the

record to support the Department's conclusion that the property was not improved. App., Vol. II, pp. 226-27.

The relevant standard of review of the Department's action is whether it was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Camp v. Pitts, 411 U.S. 138 (1973)(per curiam), citing 5 U.S.C. §706(2)(A). We agree that there is not a great deal of information in the administrative record, but we do not agree that there is so little as to defeat judicial review.

It is not disputed that at the relevant time, the shack had no water, no electricity, no foundation and no septic system. When asked on the application to describe each improvement on the land,

Bessay wrote simply "detached, one-family dwelling." App., Vol. II, p. 85. We do not think it was unreasonable or otherwise remarkable for the Department -- faced as it was with a terse, non-responsive description of Bessay's "improvements" -- to rely on personal knowledge to reach a decision. And in light of what we know about the property's condition in 1959, that decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

We have considered Bessay's other arguments, insofar as they are not subsumed by the above discussion, and conclude that they are without merit.

Accordingly, the judgment of the district court is affirmed. See Loc. R. 27.1.

By the Court,

Francis P. Scigliano

Clerk.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Plaintiff,

v.

7.92 ACRES OF LAND, MORE OR LESS, SITUATE IN THE TOWNS OF PROVINCETOWN AND TRURO, COUNTY OF BARNSTABLE, COMMONWEALTH OF MASSACHUSETTS, GRACE E. BESSAY, ET AL,
Defendants.

CIVIL ACTION
NO. 75-3546-C
TRACT NOS. 04-0001
04-0003
11-2217
11-2240
11-2241
11-2250

MEMORANDUM

March 31, 1982

CAFFREY, Ch. J.

This is an action in rem in which the plaintiff, the United States, seeks, through its power of eminent domain, to condemn and to take six tracts of land

located in Provincetown and Truro, Barnstable County, Massachusetts. The tracts which are the subject of this action are: 04-0001, 04-0003, 11-2217, 11-2240, 11-2241 and 11-2250. In her answer to the complaint in condemnation, the landowner, Grace E. Bessay, raised numerous defenses. At a prior hearing, however, counsel for the landowner withdrew all defenses, with the exception of the issue of whether the property in question is "improved property" within the meaning of Public Law 87-126, Sec. 4.(d), codified at 16 U.S.C. §4596-3(d), which created the Cape Cod National Seashore (the Act). The Act provides that the Secretary's power to condemn shall be suspended with respect to all improved property. The plaintiff has moved for

partial summary judgment, arguing that the property in question is not improved within the meaning of the Act. After hearing, I find and rule as follows.

The six tracts of land involved in the present action are non-contiguous. Only one, tract 11-2241, contains a structure. The landowner moved the structure to its present site in 1949. The structure is a one-room building without a foundation which is supported by cement blocks and is approximately 10 x 10 feet square. The building originally contained three rooms; but two rooms were destroyed by fire in 1952. The plaintiff did not produce any local permits for erection of the structure and there is neither an application for a permit nor an issued permit in the Town records.

The landowner testified that, as of September 1, 1959, she used the structure as a dwelling, that the single room in the building contained several beds, a chemical toilet and a Kerosene stove, and that perishable food was preserved by means of a wooden box containing ice. She stated that she collected rainwater for washing purposes and carried drinking water to the structure. Although she made several subsequent improvements, by 1959 there still was no electricity at the premises, no on-site source of water and no dry well or cesspool. The landowner has continuously used the property up until the present time.

On March 10, 1972, the landowner applied to the National Park Service for Certificate of Suspension of Condemnation

of Improved Property. In a letter providing her with the proper forms, the Superintendant of the Cape Cod National Seashore informed the landowner that the decision as to whether or not to issue a certificate of suspension would be based upon the information contained in the application. The landowner included a minimal amount of information on the application beyond a lengthy recitation of the chain of title. The Regional Solicitor for the Department of the Interior reviewed the application and, on May 1, 1972, the landowner was informed that her application had been denied. In a letter to the landowner, the Superintendant stated that the decision not to issue a certificate of suspension of condemnation had been based, in part,

"on our knowledge of the property." After efforts to reach settlement with the landowner had failed, the present action was commenced.

The Department of the Interior has taken informal administrative action with respect to the plaintiff's claim that her property is improved within the meaning of the Act. Where an administrative agency has made an informal decision, the proper standard for judicial review of such action has been defined by the Supreme Court in Camp v. Pitts, 411 U.S. 138 (1973):

> The appropriate standard for review was whether the . . . adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. §706(2)(A). In applying that standard, the focal point for judicial review should be the

> administrative record already in existence, not some new record made initially in the reviewing court.

Id. at 142. Consequently, this Court must evaluate the decision of the Department of Interior in light of the information available at the time the decision was made.

The landowner attacks the validity of the decision reached by the Department of the Interior in two respects. First, she suggests that the administrative record does not support the conclusion that the property in question was not improved. Second, she argues that the Department of the Interior applied an improper standard in determining that the structure in question was not a dwelling. For both reasons, the landowner asserts that the decision not to issue a certificate of

suspension of condemnation was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

With respect to her first contention, the landowner argues that the administrative record does not support the decision merely because it is brief. The Department of the Interior was under no obligation to hold a formal hearing, to make findings of fact or to disclose the reasons for reaching a decision. See e.g., Citizens to Preserve Overton Park v. Volpe, 386 F.Supp. 572, 577 (E.D. N.C., 1974). The landowner must also show that there is nothing in the record to justify the decision.

When the landowner was advised that the Department of the Interior had denied

her application, the Superintendant stated that the decision was based in part on "our knowledge of the property." It is clear that, in 1959, the structure in question was no more than a shack which had no water, no electricity, no foundation and no septic system. Further, there were no Town records to indicate that the proper permits had been obtained. To argue, as the landowner does, that this information was not properly part of the administrative record or that it should not have been considered in making a decision is to ask the Department of the Interior to reach a conclusion in a vacuum. It would have been irresponsible for the Superintendant not to investigate the landowner's conclusory statements contained in her application that the

structure was a "detached, one-family dwelling." At this subsequent time, the landowner may not argue that the Department of the Interior should not have considered the Superintendant's personal knowledge of the structure in reaching a decision. Consequently, while the administrative record may be brief, I rule that there is sufficient evidence in the record to support the conclusion that the structure was not a dwelling and that the property was not "improved" within the meaning of the Act.

In support of her second argument that the Department's decision was improper, the landowner asserts that the manner of use is the only proper test for determining whether a structure is a dwelling within the meaning of the Act.

Further, because neither the Act itself nor the legislative history mention state or local health regulations, she contends that such regulations are not relevant to a determination as to whether a particular structure is a dwelling. Essentially, the landowner states that if a structure is used as a dwelling then it must be found to be a dwelling for purposes of the Act regardless of its characteristics, condition, etc.

One need only consider the obvious ramifications of such a test to conclude that Congress never intended the manner of use to be the standard for determining whether property is "improved." If the Department of the Interior were to consider only use, then any structure, no matter how dilapidated, unsafe or

unsanitary, would be a dwelling so long as persons from time to time existed within its walls. Further, such a test would inevitably produce a conflict with those provisions of the Massachusetts state sanitary code which permit the state to condemn and to demolish structures that significantly fail to comply with the health laws. Under the landowners theory a structure in which a person is living could be a dwelling for purposes of the Act and at the same time could properly be subject to condemnation or demolition under state law.

Whether a particular structure conforms with existing state health laws is pertinent, objective evidence with respect to its legal status as a dwelling. I rule that the Department of the

Interior did not act improperly by considering known health code violations in evaluating whether the structure in question was a dwelling. Further, I rule that the Department of the Interior was not required by the Act to apply a manner of use test and that its decision that the structure in question was not a dwelling was neither arbitrary nor capricious.

In conclusion, I rule that the Department of the Interior acted in accordance with law when it decided that the property in question was not improved. Consequently, I rule that the Department of the Interior did not abuse its discretion by denying the landowner's application for a certificate of suspension of improved property, and therefore, I rule that the plaintiff's

motion for partial summary judgment should be allowed.

Order accordingly.

Andrew A. Caffrey,Ch.J.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Plaintiff,

v.

45.28 ACRES OF LAND, MORE OR LESS, SITUATED IN BARNSTABLE COUNTY, MASS., et al.,
Defendants.

CIVIL ACTION NO. 75-3546-C

TRACT NOS. 11T-2217
11T-2240
11T-2241
11T-2250

FINAL JUDGMENT OF CONDEMNATION

CAFFREY, Ch. J. It appearing to this Court that on August 27, 1975 a Complaint in Condemnation was filed in this cause in the United States District Court for the District of Massachusetts, adjudicating that the title to the real estate as described in Exhibit "A" as to the tracts above captioned (copy of pertinent parts of Exhibit "A" annexed hereto), would vest

in the United States of America, the plaintiff, simultaneously upon payment by the United States into the Registry of the Court of the amounts therein specified,

And it is further appearing that on February 24, 1986, it was determined by this Court that the value of the above-referenced tracts should be updated to reflect current market values, based on comparable sales, to wit, that the just compensation to be paid by the United States of America for the captioned property is in the amount of Seven Hundred Twenty Thousand and 00/100 ($720.000.00) Dollars, inclusive of interest, as set out on the schedule below.

And it is further appearing that there was deposited by the United States of America with the clerk of the U.S.

District Court for the District of Massachusetts for the tracts specified on the dates indicated pursuant to said Complaint in Condemnation and Order of this Court, the following amounts:

| Tract No. | Date | Amount |
|---|---|---|
| 11T-2217 | June 20, 1986 | $ 95,000.00 |
| 11T-2240 | June 11, 1986 | 220,000.00 |
| 11T-2241 | June 11, 1986 | 330,000.00 |
| 11T-2250 | June 11, 1986 | 75,000.00 |

It is therefore ORDERED, ADJUDGED AND DECREED that on the dates above listed, June 11, 1986 and June 20, 1986, the full fee simple interest to the real estate described in Exhibit "A" as to the aforesaid tracts of the Complaint in Condemnation (copy of Exhibit "A" as to aforesaid tracts annexed hereto), including all and singular the water rights and other rights, tenements, hereditaments, and appurtenances belonging

and in anywise appertaining, subject to existing easements for public roads and highways, public utilities, and pipelines, vested in the United States of America free and discharged of all claims and liens of every kind whatsoever.

Dated this 31 day of July, 1986.

Andrew A. Caffrey
Chief Judge
United States District Court